NTSB ORDER NO.
EM-71

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 14th day of September 1978.

OWEN W. SILER, Commandant,[1] United States Coast Guard,

v.

JOHN RICHARD CHRISTEN, Appellant.

Docket ME-72

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision on Appeal No. 2115, dated March 24, 1978. The Commandant reviewed therein an initial decision issued by Administrative Law Judge Archie R. Boggs,[2] following a rehearing ordered by a United States District Court. Appellant's original hearing, which he did not attend, resulted in revocation of his merchant mariner's document (No. Z-1071587-D3) for misconduct aboard ship. He appeared with counsel at his second hearing, and is acting pro se on appeal.

The law judge found that appellant serving as a messman aboard the SS AMERICAN CORSAIR, docked at Subic Bay, Philippines, on January 14, 1971, committed acts of misconduct, as charged, by threatening to blow up the vessel; deliberately throwing lighted matches about the main deck knowing that the vessel's cargo was military explosives; and setting fire to the mattress of his roommate,a saloon pantryman, while the latter was sleeping on it.[3] The law judge concluded that appellant's actions had greatly endangered life and property, and that "other seamen and ships in the future should not be exposed to such acts at [his] hands..." (I.D. 25). He thereupon entered an order revoking appellant's

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[1]Admiral Siler has been succeeded by Admiral J. R. Hayes as Commandant during pendency of the appeal.

[2]Copies of the decision of the Commandant and the law judge are attached.

[3]A further charge of failing to perform duties due to intoxication was dismissed.

document under 46 U.S.C. 239(g).[4] The Commandant, on review, affirmed both the findings and sanction.

In a prior decision, the Board affirmed the order of revocation on grounds that appellant's misconduct was established in the first hearing.[5] We also held that the hearing was properly conducted in his absence in view of his unexplained disappearance for some 10 months after a change of venue had been granted at the request of his own counsel. Subsequently, it appears that appellant sued the Coast Guard and prevailed on his claim of untimely notice of the change of venue.[6] It was found that the notice was "apparently mailed...to [appellant], who was in San Francisco, California, ordering him to report to Portsmouth, Virginia, no later than the very same day...."[7] The case was therefore remanded to the law judge at Portsmouth with the proviso that "in the event [appellant] is not given a new hearing, after proper notice, within sixty (60) days... his merchant mariner's document, previously revoked, shall be returned to him."[8] The rehearing was convened at Norfolk, Virginia, after timely notice, on the sixtieth day. It was then transferred to New Orleans, Louisiana, at appellant's request, for the evidentiary phase which extended for almost 6 months.

In his brief on appeal, appellant disputes all findings and conclusions entered on the rehearing of his case. He further contends that: (1) The 60-day limitation in the court order entitles him to the return of his document; (2) irrelevant evidence was considered concerning his seaman's employment in 1973; (3) the vessel's logbook entry reciting the offenses charged was improperly

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[4]The statute authorizes suspension or revocation actions, depending on the seriousness of offenses, where the seaman "has been guilty of misbehavior...or has endangered life...".

[5]Commandant v. Christen, Order EM-41, adopted March 5, 1975.

[6]Civil Action No. 76-160, United States District Court, Middle District of Louisiana. It should be noted that the Board was neither a party nor privy to this suit and that no petition for judicial review of the Board's order was filed at any time.

[7]This conflicts with the unrefuted showing of his counsel at San Francisco, in a letter requesting the change of venue, that appellant had already "left for Portsmouth and was to report to the United States Coast Guard there so that this matter may be heard when the vessel is in that vicinity..." Order EM-41, supra, 4.

[8]Court's minute entry, dated November 20, 1975 (ALJ Ex. I).

considered; (4) the Coast Guard failed to observe its own statutory requirements under 46 U.S.C. 239; (5) his discharge and removal from the vessel at Subic Bay were illegal; and (6) his repatriation to the United States involved violations of his constitutional rights.[9] Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, we conclude that the findings of the law judge are supported by reliable, probative,a nd substantial evidence. We adopt those findings as our own except as modified herein. Moreover, we agree that the sanction is warranted in view of the potentially disastrous consequences of appellant's misconduct.

Appellant's argument at every stage of this proceeding has been that the court order allowed only 60 days for the completion of his rehearing. In fact, so such time limit on the disposition of his case was set forth. The court's concern, as expressed in its order, was that appellant be given the opportunity to defend himself against serious charges. The opportunity was assured by the granting of a hearing de novo within the prescribed time. At most, we might conceive of the order as allowing a temporary possession of the document pending the outcome of appellant's rehearing. That argument has not been made. Instead, appellant has continually sought dismissal of the charges under the time limitation in the order, in which event he claims that the Coast Guard is barred from reinstituting such charges under time limitations in it own regulations. [10] This result is far removed from the intended effect of the court order, as we conceive it.

Moreover, we find no unreasonable delay in the conduct of the rehearing. An initial delay was attributable to appellant's request for a change of venue. Thereafter, continuances were granted to the Coast Guard in order to locate and recall witnesses from the first hearing, to take the pantryman's testimony upon returning from a sea voyage, and to arrange for the bosun's deposition on written interrogatories during a voyage in the

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[9]We find, contrary to another assertion in appellant's brief, that a copy of the charges originally served upon him is included with the record on appeal. His further request for oral argument before the Board lacks any showing of good cause and is hereby denied. 49 CFR 825.25(b).

[10]Appellant's Proposed Findings and Conclusion (page 9), citing 46 CFR 5.05-23.

Pacific.[11] Since the parties on remand were entitled to a full and complete rehearing, these delays were necessary and unavoidable. The record also discloses that the Coast Guard made its witnesses available promptly as they were located, and that their testimony was scheduled in orderly fashion by the law judge. We find no lack of compliance with the court order in the rehearing's extension until party rested its case. None of these circumstances, in our view, would invalidate the revocation order entered on remand.

Appellant's second contention concerns a certificate of discharge, which he signed upon completing a tour of duty in 1973 aboard the SS GULF ACE. It was used to impeach his testimony on cross-examination that he had not obtained seaman's employment since 1971.[12] He argues that such evidence was irrelevant to the charges. However, under modern rules of procedure, the party raising an issue beyond the scope of the pleadings has no basis to complain if the other side answer it.[13] His counsel first raised the collateral issue in asserting appellant's loss of seaman's employment since 1971 as an additional ground for dismissing the charges without a rehearing (Tr. 28). In our view, a prior written statement on this issue contradicting appellant's testimony under oath was a relevant factor in the overall assessment of his credibility by the trier of fact.

The logbook entry was made after appellant had been removed from the vessel. It appears, however, that there was sufficient time beforehand to prepare the log, read it over audibly to him, record his reply, and furnish him a copy, as required by 46 U.S.C.

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[11]At Guam, Mariana Islands. In our view, this procedure raises no serious question over the lack of face to face confrontation where, as here, it is the only means available and the witness' testimony is corroborated by other witnesses who were subject to direct cross-examination (C.D. 5-6).

[12]Tr. 62, Vol. II. This was not covered on direct but the error of the prior decisions in this regard (I.D. 23, C.D.6) is insignificant. Under the prevailing rule, cross-examination for impeachment is not limited to the scope of the direct. Moreover, we find that a proper foundation was laid since the certificate was shown to appellant before he was questioned about it. See McCormick, Evidence §§22, 28.

[13]See e.g., Rule 15(b), Federal Rules of Civil Procedure, providing that "when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

702. If not prepared in substantial compliance with law, the entry has little probative value, although it is admissible as "hearsay recording the regular course of business".[14] These principles were observed by the law judge, who disregarded the log entry in making his findings, and the Commandant, who attached only "cumulative weight" to it (C.D. 10). We agree with their findings.

The next argument is that the Coast Guard failed to conduct an immediate investigation at Subic Bay, as required by 46 U.S.C. 239(d). This provision refers to "all acts of ...misconduct [by seaman] whether or not committed in connection with any marine casualty or accident...." It also makes clear that the purpose of an immediate investigation is to "determine, as far as possible, the cause of any such casualty or accident, the persons responsible therefor...." These purposes have no application in this case and immediate investigations are not otherwise required.

Turning to the merits, the saloon pantryman testified that he was taking a nap in the afternoon when appellant entered their room and sat down in a chair. Suddenly, appellant began setting papers afire and tossing them on the pantryman's bunk. Twice the pantryman put out the flames but when his mattress caught fire he left to report the incident to the chief steward (Tr. 125-128). Another crewmember testified that he observed appellant, shortly before this incident, throwing lighted matches on the fantail of the main deck; that he warned appellant to stop because of the danger of explosion; but that appellant continued doing it as he walked toward the midship house, stating that he was "going to blow up the God-dam ship" (Tr. 67-69). The chief steward and the bosun testified to their observation of appellant alone in the room with the mattress on fire when they arrived, and to his further threats at that time to "get in the number 5 hatch to start a fire" (Tr. 55) and to find the pantryman and "burn him up or kill him...if I have to blow the whole bloody ship up."[15]

The law judge made a credibility finding in favor of these witnesses. Appellant denied all wrongdoing and accused the pantryman of setting the mattress fire (Tr. 13-18, 61-62, Vol. II) but the law judge refused to take his word against that of all other witnesses. A secondary reason given for this determination was appellant's demonstrated untruthfulness in the matter of his employment aboard the SS GULF ACE in 1973. We see no reason warranting the reversal of theses findings.

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[14]United States v. Strassman, 241 F. 2d 784, 786 (2 Cir. 1957).

[15]Bosun's deposition (Ex. 4, p. 4). See ftn. 10, supra.

Appellant's offenses formed an escalating pattern of risk to the vessel's safety as it was preparing to sail from Subic Bay. The master's actions of summoning a U.S. Naval shore patrol to remove appellant and in discharging him at that port appear justified on the record before us. Appellant argues that he should have been taken before an American Consular Office before being discharged. If he has a valid claim in that respect it is a matter for civil litigation.[16] It does not mitigate his earlier offenses in any way.

Finally, appellant raises various other complaints against the naval police and the steamship company which operated the vessel. He alleges that the police threatened to remove him forcibly if he did not leave peaceably, and that he was detained for some 30 minutes ashore before his release. Against the vessel owner, he alleges purposeful delays in providing him passage home. These matters were presented in documents reviewed on appellant's prior appeal. We adhere to the view that such allegations and claims, arising after the commission of appellant's offenses aboard ship, are extraneous to the issues in this case.[17]

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The orders of the Commandant and the law judge revoking appellant's seaman document be and they hereby are affirmed.

KING, Chairman, McADAMS, HOGUE and DRIVER, Members of the Board, concurred in the above opinion and order.

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[16]46 U.S.C. 682, 685, 703.

[17]Order EM-41, supra, 6.